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No. 94-889

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

IBJ SCHRODER BANK & TRUST COMPANY, as Trustee,

AND

EMPLOYEES' RETIREMENT SYSTEM OF ALABAMA, et al.,
Petitioners,

V.

RESOLUTION TRUST CORPORATION, as Conservator for FRANKLIN SAVINGS ASSOCIATION,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners respectfully submit this reply brief in support of their Petition for Certiorari, filed November 15, 1994.

I.

UNDER *FEC v. NRA*, THE COURT OF APPEALS LACKED JURISDICTION OVER THE RTC'S APPEAL

The RTC's brief in opposition is most startling for what it does *not* say on the issue of the Court of Appeals' jurisdiction. The RTC does not dispute that:

- In *Federal Election Commission v. NRA Political Victory Fund*, ___ U.S. ___, 115 S. Ct. 537 (Dec. 6, 1994) ("*FEC v. NRA*"), this Court ruled that, under 28 U.S.C. § 518 and 28 C.F.R. § 0.20, absent express statutory authority, a federal agency "is not authorized to petition for certiorari in this Court on its own", and that the Solicitor General cannot retroactively authorize an agency's petition "after the time for filing it had expired . . . ."

- Under the same statutory provisions, 28 U.S.C. § 518(b) and 28 C.F.R. § 0.20(b), absent express statutory authority, a federal agency likewise is not authorized to file a notice of appeal in any Court of

Appeals without first obtaining authorization from the Solicitor General.

- No statute gives the RTC independent litigating authority in the Courts of Appeals.

- In this case, the RTC failed to obtain the Solicitor General's authorization before filing its notice of appeal of the District Court's October 20, 1992 Judgment.

- Under this Court's ruling in *FEC v. NRA*, 28 U.S.C. § 518(b) and 28 C.F.R. § 0.20(b), the RTC's notice of appeal in this case was a nullity, and the time for filing an appeal of the Judgment has expired and cannot now be extended retroactively.

In response, the RTC merely claims that Petitioners' argument is "untimely" because not raised below or in the Petition.[1] Trying to bootstrap its claim, the RTC asserts that *FEC v. NRA* did not "create any new law relevant to this case", and thus that Petitioners should have figured out sooner that the RTC's appeal of the Judgment was unauthorized. The RTC's argument must be rejected for several reasons.

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[1] *FEC v. NRA* was published after the Petition was filed in this case. Petitioners did not learn that the RTC had failed to obtain the Solicitor General's consent for the appeal until making inquiries after publication of *FEC v. NRA*.

First, if the RTC's argument that *FEC v. NRA* "stated no new principle" were true, then the RTC must have known all along that it lacked authority to litigate in the Court of Appeals without the Solicitor General's authorization. This Court should not now reward the RTC for having knowingly violated the law, merely because the RTC managed to keep its violation a secret until after its appeal was determined by the court below.

Second, the RTC misses the point in arguing that the Petition should be denied because this question was not "raised or resolved in the lower court." (Opp. Brief at 10, quoting *Youakim v. Miller*, 425 U.S. 231, 234 (1976).) Petitioners do not wish to impose upon this Court to decide this question in the first instance. Indeed, the Petition *seeks* a remand to the Second Circuit for reconsideration in light of *FEC v. NRA* — the same procedure that the Court in fact followed in *Youakim v. Miller*. Moreover, Petitioners have both sought the RTC's consent to a remand to the Second Circuit (which consent the RTC denied) and moved the Second Circuit for relief from its decision (as noted in Petitioners' Supplemental Brief dated February 24, 1995).

Third, a court's failure to obtain jurisdiction over an appeal is so fundamental an issue that it can never be waived. Indeed, in *FEC v. NRA* and *United States v. Providence Journal Co.*, 485 U.S. 693 (1988), the issue of this Court's jurisdiction was raised *after* certiorari had been granted and *after* the matter had been fully briefed on the merits. Moreover, in *FEC v. NRA*, no party raised the jurisdictional issue, and that issue was

briefed only after this Court demanded such briefing *sua sponte*.

Finally, the Court should reject the RTC's contention that *FEC v. NRA* "did not create new law relevant to this case, but [merely] applied legal principles clearly set forth in *United States v. Providence Journal Co.*" (Opp. Brief at 9.) *Providence Journal* dealt only with the ability of a judicially appointed special prosecutor (not a federal agency) to proceed before the Supreme Court after he had publicly sought — and been denied — the authorization of the Solicitor General. (As noted above, in the present case Petitioners had no reason to believe that the RTC had failed to obtain the Solicitor General's consent to appeal the Judgment or that the Solicitor General would not attempt to authorize it retroactively if he had not done so prospectively.)

Providence Journal thus did not anticipate this Court's ruling in *FEC v. NRA* that the jurisdictional time periods for filing a notice of appeal or petition for certiorari can not be extended through "after-the-fact authorizations." It is this new standard that leads to the inescapable conclusion that the Court of Appeals' decision must be vacated because the Solicitor General's authorization of the notice of appeal was not obtained and cannot now be obtained retroactively.

II.

CERTIORARI SHOULD BE GRANTED ON THE MERITS OF THIS CASE.

The RTC does not adequately refute either of the Petitioners' arguments in support of the granting of certiorari on the merits of this case.

First, the RTC states in conclusory fashion that the "court of appeals in this case engaged in no fact-finding" and relied on the written "record compiled by the district court" (Opp. Brief at 4). But the fact that the Court reviewed a written record does not mean that it did not engage in fact-finding;[2] it clearly did so or it could not have found an authorization by the RTC's Board. Neither the RTC nor the opinion below points to anything in that record that supports the inferences drawn and findings made by the Court of Appeals.[3]

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[2] *See* Fed. R. Civ. P. 52(a)("Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous.")

[3] The RTC cites several cases to support the proposition that an appellate court may draw its own inferences from the record when interpreting contract or statutory language (Opp. Brief at 5). However, two of those cases involved language that was ruled to be unambiguous. *See United States v. Mississippi Valley Generating Co.*, 364 U.S. 520 (1961); *LTV Educ. Sys., Inc. v. Bell*, 862 F.2d 1168 (5th Cir. 1989). In the third case, the court resolved the ambiguous contract language by relying on evidence of acceptance by the buyer that had been presented at trial. *Lancaster Glass Corp. v. Philips ECG, Inc.*, 835 F.2d 652, 658-60 (6th Cir. 1987). Here, because no party had argued that the terms of the delegations

There are no such citations because the RTC neither made the argument adopted by the Court of Appeals nor adduced any evidence to support that argument (Pet. 14-18). The RTC does not deny these facts.

Second, although the RTC correctly points out that no other circuit has decided *exactly* this case (i.e., the necessary authorization for a repudiation decision by an official of the RTC), the RTC does not and cannot deny that the decision below is clearly contrary to the rule of law enunciated in the cases from other circuits cited by Petitioners on a fundamental and important issue of federal law — the requirement for express delegations of important governmental powers. *See* Pet. at 18-25. Thus, there *is* a conflict between the circuits that this Court should resolve concerning the requirement of explicit delegation of governmental powers.

Third, the RTC claims that "FIRREA contains no requirement or restriction regarding the RTC's repudiation authority." (Opp. Brief at 5.) But this is simply not true. FIRREA contains a clear delineation of how the powers of the RTC are to be delegated and exercised. FIRREA (as codified at the relevant time) created the Board of Directors of the RTC and vested that Board alone with the duty to prescribe "bylaws [for the corporation] that shall be consistent with law." 12 U.S.C. § 1441a(b)(10)(J). *See* App. C, 34a (quoting

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and bylaws were ambiguous, no such extrinsic evidence was ever presented or can be found in the record.

relevant section of FIRREA). The bylaws thus promulgated vest all the powers of the corporation, including the repudiation power, with the Board of Directors of the RTC. *Id.* (quoting relevant bylaw provisions). That authority was never delegated to the official by statute, regulation, Board resolution or otherwise. Thus, the instant case presents precisely the same questions concerning delegation as *United States v. Emerson*, 846 F.2d 541 (9th Cir. 1988), where, as here, there was no explicit statutory requirement for delegation by regulation.

Finally, although the RTC notes that the Court of Appeals did not consider the *formal* ratification of the repudiation decision in its ruling, by the RTC's own admission, the Court of Appeals *did* rely on the Board's "subsequent [i.e., after-the-fact] adoption of Roelle's decision." (Opp. Brief at 6.) Thus, the ruling of *FEC v. NRA* is relevant on ratification issues and the timeliness of ratification as well.[4]

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[4] Contrary to the RTC's assertion that there is no "allegation here that the ratification of Roelle's decision was untimely" (Opp. Brief at 8), Petitioners expressly have argued that the case must be remanded for a determination of whether the purported authorization event (which the Court of Appeals failed to identify) was performed within the "reasonable time" for repudiation mandated by statute and regulation. *See* Supplemental Brief at 6.

CONCLUSION

For the foregoing reasons and those set forth in the Petition and the Supplemental Briefs of Petitioners, Petitioners respectfully request that this Court grant the Petition for Certiorari on the merits, vacate the decision of the Court of Appeals and remand with instructions to dismiss the RTC's appeal. Alternatively, Petitioners request that this Court grant the Petition for Certiorari and remand the case for further consideration in light of *FEC v. NRA*.

March 6, 1995

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